breach of contract as infringes on the other party's reasonable protection. The Massachusetts court are not necessarily so bound by prior decisions as they would indicate, for the question is clearly not one of law, but one of fact for the court, and the decision of it may properly be controlled by the change of the conditions of trade which has recently come about. In the light of present history, this is no longer an effective weapon against monopoly; taking trade as it is carried on to-day, such an agreement is not an unwarrantable restriction. Greater concentration and greater restraint are matters of every-day occurrence. If the condition of things is bad, it should be attacked to some purpose.

It is scarcely necessary to call attention in this connection to Mr. S. C. T. Dodd's article in the last number of the REVIEW. The authorities are collected and discussed in an article (cited *supra*) by Amasa M. Eaton, in 4 HARVARD LAW REVIEW, 128.

RECENT CASES.

AGENCY — INJURY TO SERVANT. — Plaintiff was one of a gang of workmen who together with a foreman were employed by defendants to unload a ship. While doing so, plaintiff was injured by the breaking of the necessary apparatus, caused by negligence in its construction. *Held*, that the rule that a master is bound to furnish safe appliances, and cannot escape liability for failure to do so by intrusting the duty to a servant by whose negligence a fellow-servant is injured, does not apply where several persons are employed to do certain work, and by the contract of employment, express or implied, they are to adjust the appliances by which the work is to be done. *Burns* v. *Sennett*, 33 Pac. Rep. 916 (Col.).

There is a difference of opinion upon the subject of the liability of the master under such circumstances. This case follows the English doctrine, which is also law in Massachusetts. *Killea* v. *Faxon*, 125 Mass. 485. In *Wilson* v. *Merry*, 1 L. R. H. L. Sc. 326, the Lord Chancellor says: "The master is not and cannot be liable to his servant, unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do." In every case the question whether an agent is employed as servant or as "independent contractor" is a question of intention, and therefore a question of fact. Where the agent is one who is recognized by the law as exercising a distinct calling, involving for its exercise a certain degree of skill or experience, there is a strong presumption that the employer did not reserve any control over one who presumably knows much better than himself how to do the work, and therefore such a person will not be the servant of the party employing him. Clerk and Lindsell on Torts, 46. In this country the doctrine established by the United States Supreme Court and by most of the courts of last resort in the different States is that the master is liable for the negligent performance of duties which rest by relation upon the master, whether the master perform such duties personally or through an agent or servant. *Hough* v. *Railway Co.*, 100 U. S. 213. In *Davis* v. *Central Vermont Ry. Co.*, 55 Vt. 84, the master was held liable for the negligence of his servant in the discharge of a duty which the master owed to a general workman.

BILLS AND NOTES — LIABILITY OF PARTIES WHOSE NAMES ARE NOT ON THE INSTRUMENT. — An action was brought on a note signed "T., Agt.," and it was alleged that T., "as agent for the defendant J., under and by direction . . . of J., and in the due management . . . of her business," made the note. *Held*, upon demurrer, that no cause of action was stated: (1) the general agency alleged did not give T. authority to bind J. by a promissory note; (2) the defendant's name was not upon the face of the instrument. *Bank* v. *Turner*, 24 N. Y. Supp. 793.

The court rely principally upon the want of any allegation that T. had authority to bind J. by a note, and distinguish the case from *Moore* v. *McClure*, 8 Hun, 557, where a note was signed "M., Agent," and recovery was allowed, on the ground that specific authority was there shown. The serious difficulty, however, seems to be that the defendant's name was not upon the face of the instrument; and that alone ought to pre-

clude a recovery. It is of the utmost importance that a note which passes as money should have all the parties upon the face of it liable. The case is clearly right, and it is very doubtful if the rule in *Moore* v. *McClure* would be followed in New York.

CONSTITUTIONAL LAW — GEARY ACT. — A court commissioner, finding upon examination that defendant was a Chinese laborer who had come into the United States in violation of the Exclusion Acts, gave an order, based on §§ 3 and 4 of the Act of May 5, 1892, known as the Geary Act, directing him to be imprisoned at hard labor for two days and deported. The fourth section provides that such Chinamen as defendant "shall be imprisoned at hard labor for a period not exceeding one year." On appeal from this order to the District Court, S. D. California, Ross, Dist. J., *held*, that, as imprisonment at hard labor was an infamous punishment, that part of the order violated paragraph 3, § 2, Art. 3, of the Constitution and the Fifth and Sixth Amendments, which, taken together, provide that crimes shall be punished only after indictment and trial by jury. The part of the order directing deportation was held good. *United States* v. *Wong Dep Ken*, 57 Fed. Rep. 206.

There is nothing said in the recent decision of the Supreme Court — *Fong Yue Ting* v. *United States*, 149 U. S. 698 — about Chinamen who are found to be in this country in violation of the Exclusion Acts; but there seems to be no inherent reason for regarding the deportation of this class of Chinamen as more in the nature of a punishment for a crime than the deportation of those who fail to register. This view is supported by the fact that throughout the Geary Act both classes are included in the term, "adjudged to be unlawfully in the United States." The only reason for interfering with Chinamen who are in this country in violation of the Exclusion Acts is that they are here in violation of those Acts; and if, as it seems to follow from the decision of the Supreme Court, so being here is no crime, no provision for the disposition of such Chinamen can be punishment for a crime. This does away with the reason which Judge Ross gives for his decision; for the ground on which he annulled the order of imprisonment was that it was punishment for a crime within the terms of the Constitution. There seems, however, good reason to contend that the order of imprisonment was depriving a "person of liberty . . . without due process of law." The government, having the right to deport on summary proceedings, can without doubt confine the alien on such proceedings until he can be conveniently deported, and cause him to defray by labor some part of the expense of such confinement. It may be that that was all the fourth section was intended to authorize, — see opinions of Billings, Severens, and Edgerton, JJ., *ubi infra*; — and in that view the decision of the principal case is right, for this was an order of imprisonment for a fixed term. This construction, however, is strained. Taking the section in its most obvious sense, that of authorizing imprisonment for a fixed term, it in no wise helps in the process of deportation; and therefore it is hard to see how the government, consistently with the Fifth Amendment, can authorize its application on summary proceedings. On this view also the correct result was reached in the principal case, because the proceedings were summary. As the Supreme Court has declared there is no crime in the case, there can be no proceedings by indictment and trial; for in the absence of statutory provisions you cannot proceed by indictment when you are not trying to convict of a crime. So we are forced either to accept the strained construction or hold the fourth section nugatory; and it will be interesting to see what the Supreme Court will hold if forced to pass upon this section. Cf. *United States* v. *Wong Sing*, 51 Fed. Rep. 79, Hanford, Dist. J.; *In re Ah Yuk*, 53 Fed. Rep. 781, Edgerton, Dist. J.; *United States* v. *Hing Quong Chow*, 53 Fed. Rep. 233, Billings, Dist. J.; *In re Sing Lee*, 54 Fed. Rep. 334, Severens, Dist. J.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — RIGHT OF CITY TO TAX. — Petitioner was arrested for failure to comply with city ordinance which provided that merchandise brokers maintaining an office within the city limits must pay a license of $50 per annum. It was conceded that he was a merchandise broker, but it was "no part of his business" to make sales of goods situated within the State at the time of making the contract of sale or belonging to citizens of the State. On petition for writ of *habeas corpus*, *held*, by Williams, Dist. J., that this case came within the lines of *Robbins* v. *Taxing Dist.*, 120 U. S. 489, rather than within the lines of *Ficklen* v. *Taxing Dist.*, 145 U. S. 1, and that the license could not be constitutionally exacted from the petitioner, because it would be a tax on interstate commerce. *In re Rozelle*, 57 Fed. Rep. 155.

While Williams, J., was unquestionably right in holding that *Ficklen* v. *Taxing Dist.* did not control absolutely the decision of the principal case, the reasoning of Fuller, C. J., who gave the opinion of the court in *Ficklen* v. *Taxing Dist.*, seems to cover the principal case and take it out of the lines of *Robbins* v. *Taxing Dist.* In *Ficklen* v. *Taxing Dist.*, the Chief Justice, in the last sentence of his opinion, declared that the decision applied only to commission merchants who made sales for both parties within and parties without the State, and had paid their license, but refused to pay a tax

levied on the same basis as the license He thereby undoubtedly intimated that the distinction between that case and *Robbins* v. *Taxing Dist.*, lay in the fact that Robbins, who was a drummer, never made or intended to make it a part of his business to drum for citizens of the State, while Ficklen did a "general" commission business, and held himself open to orders from citizens of the State; but throughout the rest of the five pages of the opinion an entirely different distinction is clearly stated. The reasoning in the body of the opinion is that the tax on the drummer was clearly a tax on his principals who resided without the State, while the tax on the commission merchant was simply a tax on the business of a resident of the State, carried on within the State; and not being exacted as a condition of carrying on business for non-residents as distinguished from residents, or as tax on goods of non-residents, it could only affect interstate commerce incidentally. This line of reasoning would take the case out of the decision in *Robbins* v. *Taxing Dist.*; and as the Supreme Court seems inclined of late to restrict the application of *Robbins* v. *Taxing Dist.*, it would not be surprising to see the principal case reversed if it should be appealed.

CRIMINAL LAW — INTERSTATE RENDITION — EXTRADITED PERSON NOT EXEMPT FROM CIVIL PROCESS. — Persons brought into one State from another on extradition proceedings to answer to a charge of crime are subject to civil proceedings in the latter State. *Reid* v. *Ham*, 56 N. W. Rep. 35 (Minn.).

The court regards this decision as the logical outcome of the doctrine laid down in *Lascelles* v. *State*, 13 Sup. Ct. Rep. 687; 7 Harv. Law Rev. 185; which held that a person delivered up by one State to another may be tried for a different crime than that for which he was extradited. Two cases are cited in the opinion of the court, — *Williams* v. *Bacon*, 10 Wend. 636, and *Adriance* v. *Lagrave*, 59 N. Y. 110; but the latter is hardly in point, because the accused in that case had been given up by a foreign nation. The decision seems a sound one.

CRIMINAL LAW — JURISDICTION — SHOOTING AT ANOTHER. — Defendant while standing in South Carolina shot at, but missed, a man who was in Georgia. *Held*, defendant had committed the crime of shooting at another in Georgia. *Simpson* v. *State*, 17 S. E. Rep. 984 (Ga.).

The ground of objection taken by defendant's counsel was that the bullets took no effect in Georgia. This objection would not seem sound, as it is clearly a breach of the peace of the State of Georgia to fire bullets into it, whether any one is hit or not. The interesting question of a double crime is raised here. There is little authority on the subject, but it seems probable that defendant could be indicted in South Carolina for an attempt to kill. Brown on Jurisdiction, 92.

EQUITY — TAXATION — ENJOINING COLLECTION. — Suit for an injunction to restrain a sheriff from levying a tax warrant. The complaint alleged that the valuation placed upon the property taxed was greatly in excess of its true value; that the assessor did not give the notice required by law of the meeting of the board of equalization; that no meeting was ever held; and that the plaintiffs had no opportunity given them of appearing before the board and objecting to the valuation. There was a demurrer to the complaint, which the court sustained, deciding that the plaintiffs should have tendered or paid so much of the amount of the tax levied as they conceded was due, before invoking the aid of a court of equity. Otherwise the plaintiffs would not have to pay any of the tax levied. *Welch* v. *Clatsop County*, 33 Pac. Rep. 934 (Ore.).

This is the first time the question has arisen in Oregon, and the case follows the generally established rule well stated by Mr. Justice Miller in *Bank* v. *Kimball*, 103 U. S. 732.

EQUITY — SPECIFIC PERFORMANCE. — Municipal authorities agreed with complainant that the city should extend a sewer through plaintiff's land, and it had not been done. Plaintiff seeks to enforce specific performance. *Held*, equity will not interfere, but leave plaintiff to his action at law. *Gove* v. *City of Biddeford*, 27 Atl. Rep. 264 (Me.).

The court cites *Kendall* v. *Frey*, 74 Wis. 26, which went partly on the ground that a town or city will not be compelled to carry out such a contract, as it would be highly improper for a court of equity to interfere where it seemed best to the city to change its intentions as to the location of proposed public buildings, etc. This, of course, is within the jurisdiction of equity, — to determine what contracts shall be ordered to be specifically performed.

JUDGMENT — RES JUDICATA — EFFECT OF APPEAL. — Defendant, as the *administrator de bonis non* of the estate of A, widow of the testator, had brought suit in equity against present plaintiffs to compel them to account for certain parts of the personal estate of A which A had given into their hands during her lifetime. It was there held

that by testator's will A was clothed with full power of disposition of the personal estate, and that such disposition thereof, by her, to the present plaintiffs, was absolute and binding. The said administrator had thereupon appealed from that judgment to the Supreme Court of the United States, which appeal was still pending when plaintiffs brought the present suit against said administrator to recover amount of a legacy to them by testator, due after A's death. Defendant answers, setting up that plaintiffs have already in their hands property received from A during her lifetime which should be applied to payment of this legacy. *Held*, that this matter is *res judicata* by the final judgment in the previous suit between the parties, and the fact that an appeal from that judgment is pending does not affect the force of that judgment as a *res judicata* and a bar to this defence. *Smith* v. *Schreiner*, 160 N. W. 160 (Wis.).

This decision, that a pending appeal from a final judgment will not prevent the application of that judgment as a *res judicata*, opposed as it is to the weight of authority in the United States, shows the growing tendency to extend the doctrine of *res judicata* as a bar to multiplicity of actions between the same parties for the same cause. The Supreme Court of Wisconsin indorses a similar principle in *Neuman* v. *State*, 76 Wis. 112, and follows the rule as established in New York, *Parkhurst* v. *Berdell*, 110 N. Y. 386; in Indiana, *Burton* v. *Burton*, 28 Ind. 342; and in some other States.

MANDAMUS — MUNICIPAL BOARDS. — *Held*, that it is the better practice to join, as parties defendant in mandamus, all the members of the board which, by a vote of the majority, has been placed in the position of a recusant body, although the minority has shown an entire willingness to do the act required. The members of a co-ordinate body of the city government which is not recusant should not be made parties defendant. *Littlefield* v. *Newell*, 27 Atl. Rep. 110 (Me.).

Both propositions are thoroughly reasonable. The practice of treating the recusant body as a whole, apart from the individual disposition of its members, is more in accord with strict governmental relations than the contrary view, which is well stated in *Lamb* v. *Lynd*, 44 Pa. St. 336.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORT. — The city of Brooklyn, having control of the general subject of the discharge of fireworks, granted a permit to one A. In the course of the discharge, the plaintiff's house was injured by the negligence of A. *Held*, that the city was liable, whether its act in this particular case was *ultra vires* or not, for it was in the power of the city to act in regard to such a matter. *Speir* v. *City of Brooklyn*, 34 N. E. Rep. 727 (N. Y.).

The general statement in regard to the liability of a municipal corporation for *ultra vires* acts is undoubtedly correct; but it may be doubted if the city is liable at all in such a case as this. See *Hill* v. *Boston*, 122 Mass. 344; *Tindley* v. *Salem*, 137 Mass. 171; 2 Dillon on Munic. Corp., §§ 965, 966, in which the distinction is made that a municipal corporation is liable for injuries when acting in its corporate capacity, — *i. e.*, when it is incidentally benefited, — but not when it is acting purely for the benefit of the public, whether voluntarily, or because of an obligation imposed in its charter. This distinction certainly applies to this case, and it is submitted that this decision is erroneous. *Lincoln* v. *Boston*, 148 Mass. 578, is directly *contra* to the principal case.

PARTNERSHIP — MARRIED WOMEN — SEPARATE ESTATE. — The payee of a note executed by the firm A. D. & Co. filed a bill in equity to subject the separate estate of S., a married woman who was a partner, to the payment of the note. S. had put her separate estate into the partnership business, but without an express agreement that it should be liable to firm creditors. *Held*, the separate estate of a married woman cannot be bound by implication, but only by express agreement. Snodgrass, J., dissented on the ground that "the creditors, the business, the dealing in and only with a separate estate, . . . are all to be considered;" and so a married woman who holds herself out as engaging in a partnership with her separate property in fact contracts to bind it, though not in terms. *Theus* v. *Dugger*, 23 S. W. Rep. 135 (Tenn.).

The majority of the court follow previous Tennessee decisions, where it is asserted that an express agreement is necessary to bind the separate estate of a married woman. 8 Humph. 209; 4 Cold. 3; 2 Lea, 730; 13 Lea, 481; 85 Tenn. 412. Most of the previous decisions in the jurisdiction, however, were cases of specialty obligations of a married woman, where no intention to bind her separate property appeared on the face of the instrument. It has been said in other States than Tennessee, with some force, that to hold these obligations, simply as such, binding on the separate estate would destroy the fundamental requisite of the equitable remedy against it; namely, the agreement of the married woman to bind it. If, on the other hand, extrinsic evidence be allowed to show such an agreement, a written instrument is being altered. 22 N. Y. 450. Neither of these objections has prevailed in England, nor in some of the States in this country, where the general obligation of a married woman, and nothing more,

has been held to bind her separate estate. 1 Craig & Ph. 48; 3 Eq. Cas. 781; 117 Mass. 382; 15 Wis. 365; Daniel Neg. Inst., 3d ed., §§ 247 ff. These objections, however, which may exist in the bond or note of a married woman, do not exist in the principal case, and in following such cases we think the Tennessee court has gone astray. The note here is not the note of S., but of the partnership. As is urged, "where the married woman enters into a partnership . . . a legal entity is thereby created." Her obligation is not on the note, but arises solely out of her contract with the firm. The only question in the case, then, is whether her contract must in terms bind her separate estate. One fails to see why the ordinary rule of contracts should not apply here, and why actions should not speak as loudly as words. "If," says Vice-Chancellor Kindersley in *Matthewman's Case*, 3 Eq. Cas. 787, "the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation." We submit that this is the correct doctrine, and the opinion of the minority in the principal case ought to have prevailed.

PERSONAL PROPERTY — PRIORITY OF CHATTEL MORTGAGE OVER LIEN. — The statutory lien of a liveryman is subsequent and subject to a prior recorded chattel mortgage on the horse given by the owner. *Sullivan* v. *Clifton*, 26 Atl. Rep. 964 (N. J. L.). This case is supported by the weight of authority. Minnesota holds *contra;* but under the statute there in force no other conclusion could be reached. 36 Minn. 303. Kansas is squarely opposed to the doctrine of the New Jersey case. 21 Kan. 257. There can be no doubt of the soundness of the view advanced by the New Jersey court. "It is not to be supposed that a statute giving a lien for the keeping of an animal was intended to violate fundamental rights of property by enabling the possessor to create a lien without the consent of the mortgagee when the person in possession could confer no rights as against the mortgagee by a sale of the animal." Jones on Liens, § 691.

QUASI-CONTRACT — RECOVERY OF MONEY PAID UNDER MISTAKE — EFFECT OF DEFENDANT'S CHANGE OF POSITION. — Plaintiff, as surety of an executor, having become liable to the legatees on account of misappropriation by the executor, paid over to defendant, who was executor of A, one of the legatees, the amount of her legacy. A had died without issue before the testator, and so the legacy had lapsed; but plaintiff was ignorant of this fact. Plaintiff, subsequently learning of A's death, demanded the money of defendant; but the latter refused to refund, having by that time distributed the whole amount among A's legatees. *Held*, that plaintiff could recover the amount paid, in an action of assumpsit. If defendant was acquainted with the circumstances when he received the money, he was bound to have communicated them to plaintiff, and his payment over to the legatees would be no defence; and even assuming that defendant was ignorant of the facts, he had not changed his position so as to make it inequitable for plaintiff to recover. *Phettleplace* v. *Bucklin*, 27 Atl. Rep. 211 (R. I.).

The decision is undoubtedly right on the assumption that defendant received the money with full knowledge of the facts, since he would thus have acted fraudulently, and no equity could arise in his favor. But on the view that defendant as well as plaintiff was under a mistake, the case, it is submitted, is open to criticism. The ground for recovery of money paid under mistake is that it is against equity and conscience for defendant to keep it. As long as the parties remain *in statu quo*, the right to recovery is clear; but if because of a change of circumstances defendant can show that it is not inequitable for him to retain the money, there should be no recovery. In the present case, defendant, in consequence of plaintiff's mistake, and through no fault of his own, by paying over the money to the legatees had changed his position so that he would suffer loss if obliged to refund. The parties were no longer *in statu quo*, and it is hard to see how it was equitable, under such circumstances, for plaintiff to be indemnified at defendant's expense. "It seems difficult to establish, in a case where the defendant cannot be said to be more responsible for the mistake made by the plaintiff than is the plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake, where the result of such re-payment is to throw a loss upon the defendant which he would not have suffered, had not the payment been made." Keener on Quasi-Contracts, 67. Since one of two innocent parties must suffer, the more equitable solution would seem to be to let the loss remain where it has fallen. This view is supported by the following cases: 5 Taunt. 144; 4 B. & C. 281; 5 Pa. 516; 8 S. & R. 402; 7 Mo. App. 150; 63 N. Y. 253; 14 S. W. Rep. 1094; 8 Neb. 104; Keener on Quasi-Contracts, 59-72. It is also sustained by the rule that an innocent donee of property which had been acquired by fraud is not liable if he transfers it before notice of the equity. 30 Wis. 516; 65 Ia. 193. In accord with the principal case, see 40 N. Y. 391; 91 N. Y. 74; 6 Q. B. D. 234.

REAL PROPERTY — ADVERSE POSSESSION. — Defendant railroad company had

bought certain land of plaintiff's father, and in putting up the fence made a mistake in its location, leaving the vendor in possession of a piece of land that belonged to the company, according to exact measurement. The vendor and his son, the plaintiff here, have occupied the land for more than twenty years, thinking the fence was on the true line. *Held*, one who by mistake occupies land, not covered by his deed, for twenty years or more, with no intention to claim title beyond his actual boundary, does not thereby acquire title by adverse possession beyond the true line. *Preble et al.* v. *Maine Central R. Co.*, 27 Atl. Rep. 149 (Me.).

This doctrine grew up from the case of *Brown* v. *Gay*, 3 Greenl. 126, improperly, as it seems. It was there decided that if B encloses a parcel of A's land through mistake, it does not operate as a disseisin to prevent A passing the land by deed. It does not decide that there was no disseisin at all, only not such an one as will preclude A from passing title; yet it is treated as deciding the former point. See 5 Me. 204; 31 Me. 345. In 51 Me. 575-584 the court cites *Brown* v. *Gay* as deciding that there is no disseisin where there is mere occupation without any intention to claim title, "as where a fence is erroneously erected on the dividing line. But if in such cases there is an intention to claim title, . . . though the line is fixed by mistake, it is a disseisin." 56 Me. 265; 64 Me. 138; 72 Me. 331; and 73 Me. 105 follow this. In the principal case the court recognizes the distinction taken in the cases cited, saying that here there was no absolute intention to claim to the fence, but only a conditional one, provided that the fence was on the true line. This distinction is too fine. As Hosmer, C. J., says in *French* v. *Pearce*, 8 Conn. 439, "Intention is an essential ingredient. But a person who enters on land, believing it to be his own, does enter with that intention. . . . The very nature of the act is an assertion of his own title and a denial of all others." In accord with principal case, 34 Ia. 148; 35 Kans. 85; 33 Ala. 38; 28 Mo. 481. Subsequent decisions in Alabama and Missouri have materially lessened the force of the last-named cases; see 69 Ala. 332; 70 Mo. 372. *Contra*, 30 Ohio St. 409; 31 Minn. 81; 44 Minn. 432; and cases cited by Wood on Limitations, 2d ed. § 263.

REAL PROPERTY — DEED — DOCTRINE OF RELATION. — On the 26th of March, 1890, the plaintiff entered into a contract for the sale of certain timber-land. The purchaser paid the consideration called for on May 5, 1890, and on the same day the plaintiff delivered to him the deed of conveyance, dated March 26, 1890. After the making of the contract, and before the delivery of the deed, the defendant, a stranger, entered upon the land and cut large quantities of timber. In defence to an action of replevin, he now contends that the deed related back to the contract of sale, and that, consequently, at the time of the trespass, the title to the land was not in the plaintiff. *Held*, for plaintiff, that the doctrine of relation is a fiction of law adopted solely for the purpose of justice, and is applied only for the protection and security of persons who stand in some privity with the owner of the land, and that, therefore, the defendant in this case, being a mere trespasser, could obtain no benefit from it. *Stahl* v. *Lynn et al.*, 56 N. W. Rep. 188 (Wis.).

This is a true exposition of the law of relation. The title to the land, until the delivery of the deed, is in the seller; but if this is unfair to the buyer or those claiming under him, the court will, after the delivery of the deed, consider that the title passed at the time of the making of the contract. With regard to strangers possessing no equity, however, it is as if no such doctrine as that of relation existed. Washburn on Real Property, vol. iii. p. 309.

REAL PROPERTY — EASEMENT OF LIGHT — PRESUMPTION OF LOST GRANT. — *Held*, that in the case of light the presumption of a lost grant is not to be regarded as a matter of law, but as a question of fact, in view of all the circumstances. *Wheaton* v. *Maple* (1893), 3 Ch. 48 (Eng.).

For a discussion of this case see the Notes.

REAL PROPERTY — PARTY-WALLS — COVENANT — LIABILITY OF ASSIGNEE. — In 1876 one Steele covenanted in the usual form with one Small respecting a party-wall to be erected at once by the latter, that Steele, his heirs or assigns, should pay to Small, his heirs or assigns, one half the cost of said wall whenever Steele, his heirs or assigns, should use the same. Small built the wall, and subsequently assigned his land, reserving the covenant, which he later assigned to the plaintiff. Steele's land was assigned to defendant, who by her tenant built upon her land, using the wall in question. *Held*, that as to Small, the covenantee, the covenant did not merge in his assignment of his land, but remained with him a personal covenant, which he might properly assign, apart from his land, to plaintiff. That as to covenantor, the covenant ran with his land so as to bind his assignee, the defendant, when he used the wall. *Pillsbury* v. *Morris*, 56 N. W. Rep. 170 (Minn.).

This decision follows that in the leading case on the subject in Indiana, *Conduitt*

v. *Ross*, 102 Ind. 166, which seems to be correct on principle. It is apparent that that party who uses the wall and no other should pay for it, and so the burden of the covenant properly runs with the land of the covenantor to that owner who uses the wall; and it would seem equally clear that the covenantee in building the party-wall, one half resting on the land of the covenantee, does not thereby attach a benefit to his own land, but rather obtains for himself a personal claim upon the party who takes to himself the benefit of the wall so built, and accordingly the benefit is a personal one to covenantee, and should be assignable by him apart from his land. The prevailing opinion in this country, however, is that the benefit as well as the burden of such a covenant runs with the land to which it relates. *Savage* v. *Mason*, 3 Cush. 500. A third view, that the covenant, though intended by the parties to run to assigns, is a personal agreement only, is found in *Cole* v. *Hughes*, 54 N. Y. 444; *Gibson* v. *Holden*, 115 Ill. 199; *Behrens* v. *Hixie*, 26 Ill. App. 417; and *Kells* v. *Helm*, 56 Miss. 700.

TORT — DAMAGES FOR CONVERSION OF STOCK. — *Held*, that the measure of damages for the conversion of stock by a pledgee is the value of the stock at the time it was converted, less the sum for which it was pledged, with interest. *President and Directors of Franklin Bank* v. *Harris*, 26 Atl. Rep. 523 (Md.).

This decision is supported by the weight of authority. (See Sedgwick on Damages, vol. 2, § 519.) A more just rule, however, would seem to be laid down by *Baker* v. *Drake* (53 N. Y. 210), that the value of the goods in such cases should be their highest market price between the conversion and the time when the owner might reasonably have replaced them. By such a rule the owner is placed much more nearly in his original position; for if within a reasonable time he does not repurchase stock in the market, it may be assumed that he does not consider the speculation profitable, and would sell the stock if he had it. Whether he repurchases or not, he is indemnified. If he has repurchased stock, he is repaid the most that he can possibly have paid for it; and if he has not, he is allowed the highest price for which he could have sold it. By the rule followed in this decision, however, if the conversion occurs on a rising market, the whole gain inures to the benefit of the wrongdoer; and if the innocent party wishes to place himself in his original position by the repurchase of stock, he must pay its increase in value out of his own pocket.

TORT — LIBEL. — A postal card sent by a bank to a correspondent from whom it had received a draft on Bowdie Bros. & Co., a mercantile firm, for collection, and reading, "B in hands of notary," while in fact the draft had been paid to the bank, is libellous *per se*. *Continental Nat. Bank of Memphis* v. *Bowdie*, 23 S. W. Rep. 131 (Tenn.).

The counsel for defendant below contended that the words here used are ambiguous in their application and meaning, and are not libellous *per se* on the plaintiffs below, without extraneous facts or innuendo. The court *held*, however, that all that is necessary is that the words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. It is, of course, well settled that words which are used to injure a person in his profession, trade, or business are actionable *per se*, without proof of special damage. As to the words being ambiguous in their application, the following rule, stated by Lord Campbell, is in point: "Whether a man is called by one name or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated." Newell on Defam., 259. If asterisks be put instead of the libelled person's name, it is sufficient that those who know the plaintiff should be able to gather from the libel that he is the person meant. It is not necessary that every one should understand it. *Bourke* v. *Wanen*, 2 C. & P. 307. "All the libellers in the kingdom know now that printing initial letters will not serve the turn." *Per* Lord Hardwicke, in *Roach* v. *Gawon*, 2 Atk. 470. The decision of the principal case is undoubtedly correct.

TORTS — QUASI-CONTRACTS — DAMAGES. — A person called on the manager of defendant printing company, and offered, for a commission of 40 per cent, to bring him the printing of the Mercantile Appraisers' List at 30 cents a line for four publications. A State statute authorized certain State and county officers to have this list published in four newspapers, and to pay therefor the usual rates of advertising, not exceeding 30 cents a line, for four insertions, to be paid by the county, which should be reimbursed by the State. The manager received the county treasurer's check for the full amount, and turned over 40 per cent of it, in cash, to the person with whom he dealt. *Held*, (1) that the circumstances were such as to give the manager notice that public officers were making private profit out of their public duties; (2) that for the negligent participation of the manager in such wrong against the State, the latter can maintain an action in tort against the company; and (3) that the amount of damages which the

State is entitled to recover is the amount of the commissions, with interest. *Commonwealth* v. *Press Co.*, 26 Atl. Rep. 1035 (Penn.).

It was an error on the part of the Pennsylvania court to hold that the plaintiff, on the facts proved in this case, could not recover from the defendant, in an action of assumpsit for money had and received, the amount of the commissions, with interest. The decision as to this point proceeds upon the ground that "the defendant does not have in its possession any money belonging to the Commonwealth. It did have such money in its hands for a moment, but only for a moment." At that moment, as the court impliedly admitted, the defendant, who was a tortfeasor, would have been liable to the plaintiff, upon the familiar doctrine of "waiver of tort," in a quasi-contractual action; and it would seem a commonplace in the law of quasi-contract that such defendant cannot destroy or reduce the amount of its liability by showing that it transferred the wrongfully acquired property in whole or in part to another. This is rendered apparent when one bears in mind that the payment of part of the proceeds of the check to the party who proposed the tortious transaction was a part of such transaction. In connection with this case it is interesting to find that Mr. Keener, in his recent work on Quasi-Contracts, while discussing the nature of the liability of joint tortfeasors where the tort is waived, has been careful to avoid the conclusions reached in *Commonwealth* v. *Press Co.* See Keener on Quasi-Contracts, pp. 200–203.

TRUSTS — PURCHASER WITH NOTICE FROM PURCHASER WITHOUT. — A purchaser of land with notice of prior equities from a purchaser without notice gets a clear title. *Klinger* v. *Lewler*, 34 N. E. Rep. 698 (Ind. Sup. Ct.).

The decision is correct. The court quote as a cogent reason for the rule 2 Perry on Trusts, § 830, that such a purchaser is protected, "not on his own merit, but on the merit of the innocent purchaser; for if such a purchaser could not sell the estate, he would be deprived of one of the valuable attributes of his property." It is respectfully submitted that the reason given by the court in their quotation from the learned author of Perry on Trusts is defective, in that it looks at the question from the standpoint of the wrong party. Were it the merit of the innocent purchaser which protects one who buys from him, then a fraudulent trustee or vendee who regains the land from an innocent purchaser to whom he has sold it would take the title free from any equities. Such, however, is not the law. 2 Perry on Trusts, § 830, note 5. 1 Ames' Cases on Trusts, 287, second paragraph, where cases are fully collected. Justice does not permit a dishonest trustee who sells trust property to an innocent party to buy it again and keep it for himself; equity will not allow him to set up his own wrong in defence. The truth is the defendant is protected on his own merit. He has obtained a legal right without being in any sense a party to a dishonest transaction, and he has paid value for it; consequently he has all the privileges of a purchaser without notice.

WILLS — CHARITABLE BEQUESTS. — A direct bequest to an unincorporated but regularly organized charitable association, is valid, although no limitation be made as to its use. *Hadden* v. *Dandy*, 26 Atl. Rep. 464 (N. J.).

The point is a new one in the State, but the case follows *Wellbeloved* v. *Jones*, 1 Sim. & S. 40, and quotes the case in 35 Pa. 316, as a direct authority. There the theory is laid down that as the rules of the society provide for the application of its funds to charitable purposes, the bequest must be taken to be a charitable one, and is therefore not too indefinite.